



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

SMC

Docket No: 04786-99

28 October 1999

SGT [REDACTED] USMC
[REDACTED]
[REDACTED]

Dear Sergeant [REDACTED]:

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 28 October 1999. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the report of the Headquarters Marine Corps (HQMC) Performance Evaluation Review Board (PERB), dated 26 July 1999, and the advisory opinion from HQMC dated 29 June 1999, copies of which are attached.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the report of the PERB and the advisory opinion. The Board was unable to find you were denied your right to defend yourself concerning the vacation of suspension of your reduction in grade. Specifically concerning the contested fitness report for 27 June to 28 October 1992, the Board found nothing objectionable about your having been marked qualified for promotion, when the narrative states you received nonjudicial punishment. In view of the above, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records.

4786-99

Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosure



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

476699

IN REPLY REFER TO:
1610
MMER/PERB
JUL 26 1999

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
SERGEANT [REDACTED], USMC

Ref: (a) Sergeant [REDACTED]'s DD Form 149 of 27 Apr 99
(b) MCO P1610.7C w/Ch 1-6

Encl: (1) SJA Advisory Opinion 5300 JAM3 of 29 Jun 99

1. Per MCO 1610.11C, the Performance Evaluation Review Board, with three members present, met on 21 July 1999 to consider Sergeant [REDACTED] petition contained in reference (a). Removal of the following fitness reports was requested:

- a. Report A - 920627 to 921028 (CH)
- b. Report B - 921029 to 921111 (GC)

Reference (b) is the performance evaluation directive governing the submission of both reports.

2. The petitioner contends that the nonjudicial punishment (NJP) reflected in Report A and the reduction in grade reflected in Report B are unjust actions. He bases this argument on the absence of documentation in his Official Military Personnel File (OMPF) and Service Record Book (SRB) documenting these situations.

3. In its proceedings, the PERB concluded that both reports are administratively correct and procedurally complete as written and filed. The following is offered as relevant:

a. When the petitioner acknowledged the adverse nature of both reports via signature in Item 24, he opted to omit statements of rebuttal. In so doing, he passively concurred in the accuracy of the evaluations and indicated he had no matters to present in extenuation and mitigation of the recorded information. Absent documentary evidence to the contrary, it must be presumed that the petitioner acknowledged **being the recipient of NJP** (Report A) and **being reduced in grade** (Report B). Notwithstanding the absence of additional documentation in the petitioner's OMPF and SRB, these are obviously factual

(3) PERB REPORT & AD

Subj: MARINE CORPS PERFORMANCE EVALUATION REVIEW BOARD (PERB)
ADVISORY OPINION ON BCNR APPLICATION IN THE CASE OF
SERGEANT [REDACTED] USMC

occurrences correctly reflected in the challenged fitness reports.

b. It is the Board's position that to justify deletion of a fitness report, evidence of probable error or injustice should be produced. Such is simply not the situation in this case.

4. The Board's opinion, based on deliberation and secret ballot vote, is that the contested fitness reports should remain a part of Sergeant [REDACTED] official military record.

5. The enclosure is furnished to assist in resolving the petitioner's challenge to the imposition of NJP and reduction in grade.

6. The case is forwarded for final action.

[REDACTED]

Chairperson, Performance
Evaluation Review Board
Personnel Management Division
Manpower and Reserve Affairs
Department
By direction of the Commandant
of the Marine Corps

5300

JAM3

29 JUN 1999

SJA TO CMC COMMENT on MMER r/s of 11 May 99

Subj: PERFORMANCE EVALUATION REVIEW BOARD ICO
SERGEANT [REDACTED] USMC

1. Issue. We are asked to review and comment on Sergeant [REDACTED] request to remove two fitness reports from his Official Military Personnel File. Our comments are limited to the propriety of the nonjudicial punishment and the imposition of a suspended punishment.

2. Opinion. For the reasons set forth below, we see no impropriety in Sergeant [REDACTED] nonjudicial punishment or the subsequent imposition of a suspended punishment. We conclude that these facts were appropriately mentioned in his fitness reports for the reporting periods 920627 to 921028 and 921029 to 921111.

3. Background

a. Based on the available records, we determined that on 29 October 1992, Sergeant [REDACTED] was the subject of battalion commander's nonjudicial punishment for larceny in violation of Article 121, Uniform Code of Military Justice.¹ Among his punishments, Sergeant [REDACTED] was reduced to pay grade E-4, given 45 days extra duty, and placed on some period of restriction. The reduction in pay grade was suspended for 6 months. Effective 11 November 1992, the suspension was vacated and Sergeant [REDACTED] was reduced to pay grade E-4 for violating the terms of his restriction.

b. Sergeant [REDACTED] nonjudicial punishment is reflected in his fitness report for the reporting period 920627 to 921028. The imposition of the suspended punishment is reflected in Sergeant [REDACTED] fitness report for the period 921029 to 921111.

¹ We note that units typically retain their administrative records (including records of nonjudicial punishment) for only two years. Although page 11 or 12 entries apparently do not appear in Sergeant [REDACTED] service record book, appropriate entries were apparently made in the unit diary (Marine Corps Total Force System) to reflect Sergeant [REDACTED] reduction in rank.

Subj: PERFORMANCE EVALUATION REVIEW BOARD ICO
SERGEANT [REDACTED] JSMC

4. Analysis

a. Sergeant [REDACTED] makes five arguments as to the impropriety of these fitness reports. His first two arguments note the lack of either service record book entries or references in his Official Military Personnel File regarding the nonjudicial punishment. We conclude that although notations do not appear on pages 11 and 12 of Sergeant [REDACTED]'s service record book, the absence of such notations does not indicate that his nonjudicial punishment was unfair or unlawful. We note that a record of Sergeant [REDACTED] nonjudicial punishment does appear in his Official Military Personnel File since the two fitness reports discussing it are included in that file.

b. Sergeant [REDACTED] third argument is that his nonjudicial punishment was based upon a report from another command. This argument has no legal basis since a commander may consider any information he considers relevant, whatever its source, to determine an individual's guilt at nonjudicial punishment proceedings. See paragraph 4c(3), Part V, Manual for Courts-Martial, United States (1984 edition).

c. Sergeant [REDACTED] fourth argument is that notwithstanding his nonjudicial punishment, he was recommended for promotion in block 19 of both disputed fitness reports. We observe that while this appears to be the case for his fitness report for the period 920627 to 921028 (he was not recommended for promotion in the fitness report for the period 921029 to 921111), that fact has no bearing on whether Sergeant [REDACTED] was guilty of the offense for which he received nonjudicial punishment, or on the lawfulness of the punishment imposed.

d. Sergeant [REDACTED] last argument is that the battalion commander acted without justification when he vacated the suspended punishment and imposed Sergeant [REDACTED] reduction to corporal. This argument is also meritless. Sergeant [REDACTED] fitness report for the period 921029 to 921111 states that the suspension was vacated and punishment imposed because Sergeant [REDACTED] violated the terms of his restriction. We find that such a violation is a legally sufficient basis to vacate a suspended nonjudicial punishment. We further find that the vacation occurred within the 6 month period of suspension as required by paragraph 6a, Part V, Manual for Courts-Martial, United States (1984 edition)

e. A commander's decision to impose nonjudicial punishment should not be disturbed absent clear evidence of an abuse of

4786-99

Subj: PERFORMANCE EVALUATION REVIEW BOARD ICO
SERGEANT [REDACTED] USMC

discretion. We find no evidence of abuse of discretion in either Sergeant [REDACTED] nonjudicial punishment or the vacation of his suspended reduction to pay grade E-4.

5. Conclusion. For the reasons stated above, we find no error in Sergeant [REDACTED] nonjudicial punishment or the vacation of his suspended punishment. We conclude that these matters were appropriately referenced in Sergeant [REDACTED] fitness reports for those periods.

[REDACTED]
[REDACTED]
By direction